1-1-2011

Sissel v. HHS - Plaintiff's Memo Opposing U.S. Motion to Dismiss

Matt Sissel

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

MATT SISSEL, Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as United States Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; and TIMOTHY GEITHNER, in his official capacity as United States Secretary of the Treasury, Defendants.	)	Case No. 1:10-cv-01263 (RJL)

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS
[ORAL ARGUMENT REQUESTED]

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INTRODUCTION

In this action, Plaintiff Matt Sissel challenges the constitutionality of the Individual Mandate provision of the Patient Protection and Affordable Care Act (Act). The Individual Mandate requires most Americans, including Sissel, to either buy and maintain federally approved health insurance, or pay a hefty penalty beginning in 2014. The Individual Mandate's obligations must be satisfied even if, like Sissel, the individual is self-insured and does not want to buy insurance, is healthy, and can pay for medical expenses out of pocket. This federal regulation of inactivity—based merely on one's lawful presence in the country—is an unprecedented exercise of power that finds no authority in the United States Constitution, which is why Sissel seeks a declaration to that effect, and an injunction prohibiting its enforcement.

Defendants United States Department of Health and Human Services, et al., (Government) have moved to dismiss Sissel's suit, based on alleged jurisdictional defects and failure to state a claim. The Government's motion is without merit and should be overruled.

As for the jurisdictional arguments, the Government claims that Sissel lacks standing, and that his suit is both unripe and barred by the Tax Anti-Injunction Act—a statute that precludes pre-enforcement challenges to "taxes." With respect to standing, Sissel's complaint pleads detailed facts demonstrating his concrete and particularized injuries that stem directly from the Individual Mandate. While not in effect until January 2014, the Individual Mandate imposes obligations that force Sissel and other nonexempt individuals to prepare now to meet them. Sissel already has significantly altered his personal and financial affairs so that he has sufficient funds to satisfy the Individual Mandate. In addition to this actual injury, the Individual Mandate also imposes the imminent injury of compelled purchase of a service that for many, including Sissel, is neither needed nor wanted.

For many of the same reasons, Sissel's action is ripe. The Individual Mandate will inevitably go into effect in 2014 absent judicial intervention to stop it. There are no factual developments that could take place between now and January 2014 that would help this Court resolve the merits of his challenge, and withholding review would inflict serious hardship on Sissel (who is making financial preparations now to comply with the mandate) and to the public as a whole (many of whom share Sissel's injuries).

The Government's last jurisdictional argument—that the Tax Anti-Injunction Act bars this case—is based on an inaccurate characterization of the nature of the Individual Mandate's financial penalty for noncompliance. As the Act's history, text, and purpose show, the penalty is just that: a tool designed and intended by Congress to coerce individuals to buy a service and to penalize those who fail to comply with the mandate. It is not a tax and, therefore, not subject to the Tax Anti-Injunction Act.

Finally, the Government argues that the Individual Mandate is constitutional under the Commerce Clause, the Necessary and Proper Clause, or the General Welfare Clause. Not so. The Individual Mandate regulates *inactivity*—the choice *not* to purchase a good or service (health insurance. There is nothing in the Commerce Clause or the Necessary and Proper Clause—or in any of the precedents that have interpreted them—that sanctions such an unprecedented reach of federal power. To the contrary, the Commerce Clause authorizes the regulation only of activity—some voluntary act or deed that places one into the stream of commerce—and not inactivity, like Sissel's choice to not purchase health insurance. As for the General Welfare Clause, the Government's argument again rests on the faulty premise that the Individual Mandate and its penalty constitute a "tax" that is being impose for the "general welfare." As explained above, the penalty is a punitive

measure whose purpose is not to raise revenues for the Government, but rather to compel individuals into engaging in commerce by purchasing health insurance.

For all these reasons, the Government's motion should be denied.

ORAL ARGUMENT REQUESTED

Pursuant to Local Rule 7, Sissel requests an oral hearing on the Government's Motion to Dismiss.

STATEMENT OF THE CASE

Plaintiff Matt Sissel is a United States citizen and a permanent resident of Iowa. For a period of time—through August 2008—he was studying to become an artist at the Academy of Realist Art in Toronto, Canada. But in August 2008, he returned home to Iowa City, Iowa, to open up his art studio. Complaint for Declaratory Judgment and Injunctive Relief (Complaint) at ¶ 5.

Sissel currently is self-employed as an artist and markets his own artwork for sale. He is financially stable, has an annual income that requires him to file federal tax returns, and could afford health insurance if he wanted to obtain such coverage. But he does not have, need, or want to purchase health insurance. Since he left the National Guard almost three years ago, he has been uninsured, and he does not qualify for government-subsidized health insurance. Complaint at ¶¶ 5, 24.

Sissel is healthy, has no pre-existing medical conditions, and is self-insured, paying out of pocket any medical expenses that arise. Complaint at ¶¶ 5, 24. Sissel is not delinquent on any health-related expenses. *Id.* at ¶ 24. Sissel intends to continue to self-insure because he believes the cost of health insurance premiums is excessive. *Id.*

In March, 2010, Congress passed and the President signed into law the Patient Protection and Affordable Care Act. The Act contains an "Individual Mandate" provision that becomes effective

in 2014 and that requires every nonexempt "applicable individual" with legal residence in the United States to have "minimum essential" health insurance coverage as defined in the Act, or pay a financial penalty. 26 U.S.C. § 5000A(a). The Act defines "minimum essential coverage" to include various public and private health insurance options. 26 U.S.C. § 5000A(f)(1)(A)-(E). Importantly, applicable individuals may not self-insure under the Act—*i.e.*, they are prohibited from paying for their medical expenses out of pocket.

Sissel is not exempt from the Individual Mandate. He is not a Native American, has no religious objection to the Individual Mandate, and cannot claim the living-abroad exemption. Consequently, Sissel is subject to the Act's Individual Mandate to purchase federally approved health insurance or to pay a financial penalty. *Id.*

Unless he obtains "minimum essential coverage" before January 1, 2014, he will incur penalties for each month he remains without such coverage as required by the Act. The penalty for failure to purchase approved health insurance is the greater of 2.5% of the taxpayer's annual income, or $695 for each uninsured family member per year, up to a maximum of $2,085 per family per year. 26 U.S.C. § 5000A(c). Complaint at ¶ 16.

Sissel must act now to make financial plans to satisfy the mandate's requirements. *Id.* ¶ 23. To ensure adequate resources to comply with the mandate, he has determined that he can no longer afford to pursue further education in art. Instead, he has chosen to focus exclusively on the production and sale of his artwork in order to brace for the impending obligations imposed by the Individual Mandate. *Id.* ¶ 26.

Additionally, he can no longer attend many of the national and international conferences and workshops relevant to his art profession, because he must reduce expenditures in light of anticipated new health care costs, or penalties, imposed by the Individual Mandate. Likewise, his ability to

travel abroad has been impaired by the mandate's financial obligations. For example, Sissel had planned to tour Europe upon completion of his studies in Toronto, in order to study some of the world's greatest artworks in person, but he can no longer afford to do so as a result of the need to save money for the Individual Mandate. Lastly, Sissel fears that his personal and professional reputation will be tarnished due to the penalties he will face if he fails to purchase health insurance. *Id.* ¶ 26-28.

Sissel brings this suit against various federal government officials responsible for enforcing the Individual Mandate in a challenge to the Individual Mandate's constitutionality. He alleges that the Individual Mandate exceeds Congress's constitutional authority. He seeks declaratory and injunctive relief that the Individual Mandate is, both on its face and as applied to him, unconstitutional and unenforceable.

STANDARD OF REVIEW

The Government moves to dismiss under both Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. On a motion to dismiss, the Court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party," *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

Moreover, to survive a Rule 12(b)(6) motion, plaintiff's complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint must give the defendant notice of the claims and the grounds upon which they rest, but "[s]pecific facts are not necessary." *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009) (internal citations and quotation marks omitted). "A court may not grant a motion to dismiss for failure to state a claim even if it strikes a savvy judge that . . . recovery is very remote and unlikely." *Id.* (internal citations and quotation marks omitted). "So long as the

pleadings suggest a 'plausible' scenario to 'sho[w] that the pleader is entitled to relief,' a court may not dismiss." *Id.* (internal citations and quotation marks omitted).

ARGUMENT

I

THE COURT HAS JURISDICTION OVER SISSEL'S CLAIM

The Government argues that Sissel lacks standing, his claim is unripe, and his claim is barred by the Tax Anti-Injunction Act. On a Rule 12(b)(1) motion, the Court must accept as true all material factual allegations in the complaint, and must construe the complaint in favor of the plaintiff. *Warth*, 422 U.S. at 501. Under this standard, the Government's motion to dismiss fails: Sissel has pled sufficient facts to support this Court's jurisdiction. Indeed, virtually identical arguments have been rejected by district courts in Florida, Virginia, Ohio, and Michigan. *Florida v. U.S. Dep't of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2010 U.S. Dist. LEXIS 111775, at **56-76 (N.D. Fla. Oct. 14, 2010); *Liberty University v. Geithner*, No. 6:10-cv-00015-NKM, 2010 U.S. Dist. LEXIS 125922, at **11-29 (W.D. Va. Nov. 30, 2010); *United States Citizens Ass'n v. Sebelius*, No. 5:10-cv-1065, 2010 U.S. Dist. LEXIS 123481, at **10-13 (N.D. Ohio Nov. 22, 2010); *Thomas More Law Ctr. v. Obama*, No. 10-CV-11156, 2010 U.S. Dist. LEXIS 107416, at **10-14 (E.D. Mich. Oct. 7, 2010).

A. Sissel Has Standing To Challenge the Individual Mandate

1. The Complaint Alleges Specific Facts Establishing Both Present and Imminent Injuries

The facts alleged in the Complaint establish Sissel's standing to challenge the Individual Mandate. To establish standing under Article III of the United States Constitution, a plaintiff must suffer "an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis v. FEC*,

554 U.S. 724, 747 (2008) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [the court] presume[s] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561 (internal citations and quotation marks omitted); *see also Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329 (1999) (observing that "mere allegations of injury" are sufficient to defeat a challenge to standing on a motion to dismiss); *Florida*, 2010 U.S. Dist. LEXIS 111775, at *57 (concluding that plaintiff challenging Individual Mandate had standing).

Sissel is an American citizen and a permanent resident of Iowa, where he currently resides as of August, 2010. Complaint at 2 ¶ 5. Before returning to permanently reside in Iowa, Sissel was a student at the Academy of Realist Art in Canada. *Id.* He is a self-employed artist, marketing and selling his own artwork. *Id.*

While he could afford health insurance, he does not have, need, or want to purchase health insurance. *Id.* Indeed, Sissel is financially stable, and has been paying for any and all of his medical expenses out of pocket since January, 2008. *Id.* at 2 ¶ 5; *id.* at 7 ¶ 24. Sissel does not qualify for any of the exemptions from the Individual Mandate, which requires him to buy federally approved health insurance or, beginning in 2014, pay a financial penalty at his own expense and against his will. *Id.* at 2 ¶ 5; *id.* at 5 ¶ 15.

The Individual Mandate subjects Sissel to two distinct injuries. First, since its enactment in March, 2010, the Individual Mandate has been inflicting actual injury on Sissel, because it requires him to substantially alter his affairs by cutting short his art education and make financial plans to satisfy the mandate's requirements. *Id.* at 7 ¶ 23. In other words, the Individual Mandate forces Sissel to divert resources *now* from his art education and career development in order to save money

for either the purchase of federally approved health insurance or the payment of penalties. This is a concrete, particularized, and legally cognizable injury. *Davis*, 554 U.S. at 747; *see also Thomas More*, 2010 U.S. Dist. LEXIS 107416, at *11 ("Plaintiffs' decisions to forego certain spending today, so they will have the funds to pay for health insurance when the Individual Mandate takes effect in 2014, are injuries fairly traceable to the Act for the purposes of conferring standing."); *Liberty University*, 2010 U.S. Dist. LEXIS 125922, at *21 (holding that plaintiffs had standing "[b]ecause the future expenditure required by the Act entails significant financial planning in advance of the actual purchase of insurance in 2014," requiring them to "incur . . . preparation costs in the near term").

The Complaint describes, in detail, how Sissel already has had to reorder his personal affairs because of the Individual Mandate. When the Individual Mandate and its impending obligations became law in early 2010, Sissel decided he could no longer "afford to continue his education in Canada" and returned home to Iowa. Complaint at 8 ¶ 26. "As a direct consequence of [the mandate's] newly imposed financial liability," he has begun "selling his artwork, and will continue to do so, rather than devote his attention full-time to his studies." *Id.* And his "ability to attend national and international conferences and workshops relevant to his art profession"—like next year's annual conference for the American Portrait Society in Georgia—"has been curtailed because he is obliged to reduce expenditures in light of the anticipated new health care costs, or penalties, imposed by the Act." *Id.* at 8 ¶ 27.

Second, in addition to the *actual* injury it imposes on Sissel at present, the Individual Mandate inflicts an *imminent future* injury. Beginning in 2014, the mandate will coerce Sissel into buying federally approved health insurance or paying penalties to the federal government. *Id.* at 5 ¶ 15. As he alleges in his complaint, and as evidenced by his last three years of successfully self

insuring for all medical expenses, Sissel "intends to continue to self-insure because he believes the cost of health insurance premiums are excessive." *Id.* at 7-8 ¶ 24. Should he fail to comply with the mandate, he will have to pay an annual financial penalty. This imminent injury is an independent ground for Sissel's standing to challenge the Individual Mandate. *Lujan*, 504 U.S. at 560 (holding that actual *or* imminent injury is sufficient to confer standing).

Several federal district courts considering motions to dismiss in cases challenging the Individual Mandate's constitutionality have held that plaintiffs with injuries essentially identical to Sissel's have standing. In the *Florida* case, the individual plaintiffs are subject to the Individual Mandate, but neither have nor want to purchase health insurance. *Florida*, 2010 U.S. Dist. LEXIS 111775, at *58. One of the plaintiffs alleges that the mandate will force her to "'divert resources from [her] business endeavors'" and "'reorder [her] economic circumstances.'" *Id.* (citing Complaint). And both plaintiffs claim the injury that the Individual Mandate "will force them to spend their money to buy something they do not want or need (or be penalized)." *Id.* at *59 (citing Complaint). On a motion to dismiss, the Florida court held that plaintiffs had standing. *Id.* at **66-67. "In short, to challenge the individual mandate, the individual plaintiffs need not show that their anticipated injury is absolutely certain to occur despite the 'vagaries' of life; they need merely establish 'a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement,' that is reasonably 'pegged to a sufficiently fixed period of time,' and which is not 'merely hypothetical or conjectural.'" *Id.* at *66 (citations omitted).

Similarly, in *Liberty University*, 2010 U.S. Dist. LEXIS 125922, the plaintiffs subject to the mandate to purchase health insurance allege that they "will have to make 'significant and costly changes' in their personal financial planning, necessitating 'significant lifestyle . . . changes' and extensive reorganization of their personal and financial affairs." *Id.* at *18. And in *Thomas More*,

2010 U.S. Dist. LEXIS 107416, the plaintiffs allege that the Individual Mandate compels them to "reorganize their affairs" and "feel economic pressure today." *Id.* at **9, 11. On motions to dismiss, the Virginia and Michigan courts held that the plaintiffs—who allege the same injuries as Sissel—have standing to challenge the Individual Mandate. *Liberty University*, 2010 U.S. Dist. LEXIS 125922, at *26; *Thomas More*, 2010 U.S. Dist. LEXIS 107416, at *13; *see also United States Citizens Ass'n v*, 2010 U.S. Dist. LEXIS 123481, at *13 (holding that plaintiffs had present- and imminent-injury standing—similar to that alleged by Sissel—to challenge Individual Mandate).

2. None of the Government's Arguments Against Sissel's Standing Has Merit

The Government denies that Sissel suffers either actual or imminent injury legally sufficient to satisfy the standing requirement. The Government deprecates Sissel's actual injury of having to reorder his affairs as a reaction—"entirely within his own control"—to the "remote and contingent" possibility of the Individual Mandate's operation. Defendants' Motion to Dismiss (Mot.) at 12. If accepted, the Government warns, Sissel's claim to actual injury "would render the imminence requirement a hollow shell." *Id.* (citing *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279 (D.C. Cir. 2007)).

The Government errs. The Individual Mandate's operation is not "remote and contingent." Absent judicial intervention or the near-impossibility of a legislative repeal, the mandate's operation is imminent and certain. *Accord, Thomas More*, 2010 U.S. Dist. LEXIS 107416, at **3-4. Moreover, it is false to say that Sissel's injury is of his own making. To the contrary, Sissel's decision to alter his affairs and save money now is entirely caused by the Individual Mandate's imminent operation, and by the fact that the new law imposes an unavoidable and significant financial obligation. For Sissel to reorder his personal affairs in anticipation of this new expenditure

is, as one court recently put it, a "responsible" decision made in preparation of the Individual Mandate's becoming effective:

> The fact that the Individual Mandate and employer mandate do not go into effect until 2014 does not mean that they will not be felt in the immediate or very near future. To be sure, responsible individuals, businesses, and states will have to start making plans now or very shortly to comply with the Act's various mandates.

United States Citizens Ass'n, 2010 U.S. Dist. LEXIS 123481, at *11.

The Supreme Court has made clear that being forced to make plans now to satisfy a future legal liability confers standing to challenge that liability. *See, e.g., Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 n.29 (1923))). In addition, district courts reviewing the challenges to the Individual Mandate have held that immediate preparations taken in response to the Individual Mandate are sufficient to confer standing to challenge that future liability. *Florida*, 2010 U.S. Dist. LEXIS 111775, at *58; *Liberty University*, 2010 U.S. Dist. LEXIS 125922, at *18; *Thomas More Law Ctr.*, 2010 U.S. Dist. LEXIS 107416, at **11-12; *United States Citizens Ass'n*, 2010 U.S. Dist. LEXIS 123481, at *11.

The Government's authorities do not support rejection of Sissel's actual-injury standing. In *Public Citizen*, 489 F.3d 1279, a tire manufacturing group and a citizens group challenged a regulation requiring automakers to install automatic tire pressure monitoring systems in new vehicles. The petitioners contended that the regulation did not go far enough in mandating that automakers protect against the underinflation of tires. In defense of its standing to sue, the tire group argued that the alleged underregulation of automakers would lead to more accidents in the future than otherwise would occur, and that those injured in the accidents would in the future bring warranty claims and suits against tire manufacturers. *Id.* at 1290. The citizens group made a

similarly attenuated claim of future injury based on the increased risk posed by underregulation of the automakers. *Id.* at 1291. The group argued that some of its members would, in the future, suffer more car accidents than stricter regulation of automakers would prevent.

The Circuit Court of Appeals first observed that "standing is substantially more difficult to establish where, as here, the parties invoking federal jurisdiction are not the object of the government action or inaction they challenge." *Id.* at 1289 (internal citation and quotation marks omitted). The petitioners' "remote and speculative claims of possible future harm to its members" could not support standing. *Id.* at 1294. Unlike the *Public Citizen* petitioners, who claimed speculative harm in the future from a regulation not even applicable to them, Sissel claims actual and concrete harm resulting from a law that indisputably is.

The Government's other authorities—all of which involve standing claims based on self-inflicted harms not traceable to the challenged laws—are irrelevant. For example, in *McConnell v. Fed. Elections Comm'n*, 540 U.S. 93 (2003), *overruled in part on other grounds*, *Citizens United v. Fed. Elections Comm'n*, 130 S. Ct. 876 (2010), plaintiffs challenged a statutory amendment to the campaign finance law that increased the limits on certain contributions. Wishing to avoid the appearance of improper access and influence, some plaintiffs planned of their own accord to refuse the larger contributions allowable under the amendment, thereby putting themselves at a competitive disadvantage in the electoral process. *McConnell*, 540 U.S. at 228. According to the plaintiffs, this competitive disadvantage constituted an "injury" sufficient for standing. *Id.*

The High Court disagreed, concluding that the alleged injury was not a consequence of the challenged law. The plaintiffs' "alleged inability to compete stem[med] not from the operation of [the amendment], but from their own personal 'wish' not to solicit or accept large contributions, *i.e.*, their personal choice." *Id.* In other words, nothing in the statute prevented the plaintiffs from

competing and accepting increased contributions. *Id.* By contrast, Sissel's injury stems directly from the Individual Mandate; it requires Sissel to make significant expenditures (on health care insurance or on an annual financial penalty) against his own wish to invest in his education and career. *See also Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) (plaintiff's unsubstantiated threat of future injury "largely of its own making" and not traceable to defendant's conduct); *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161 (D.C. Cir. 2005) (plaintiff's unsubstantiated claim of mere "increased risk" of future injury hypothetically resulting from regulation of third party insufficient to confer standing); *Sanner v. Bd. of Trade of City of Chicago*, 62 F.3d 918, 923 (7th Cir. 1995) (alleged injury with numerous possible causes not fairly traceable to defendant's conduct). His present financial undertakings are proximately and exclusively the consequence of the impending imposed by the Individual Mandate.

The Government also argues that Sissel's future injury of having to buy health insurance or pay a penalty starting in 2014 is too temporally remote and therefore too speculative to support standing. Mot. at 10-12. The Government's argument has no merit.

Ironically, it is only the Government that speculates about "a wide range of scenarios"—self-expatriation, career change, economic hardship, and serious illness—that might occur between now and 2014 so as to render Sissel exempt from or compliant with the Individual Mandate. *Id.* at 11-12. No speculation of any sort is required to conclude that Sissel will be forced to comply with the Individual Mandate or pay a penalty to the Government. The Florida district court recently rejected an identical attempt to speculate away the plaintiffs' standing:

> [The government defendants] allege, for example, that while Ms. Brown may not want to purchase healthcare insurance now, . . . and although Mr. Ahlburg does not need insurance now . . ., the "vagaries" of life could alter their situations by 2014. Def Mem. at 26. The defendants suggest that because "businesses fail, incomes fall, and disabilities occur," by the time the Individual Mandate is in effect, the individual plaintiffs "could find that they need insurance, or that it is the most sensible choice."

> *See id*. That is possible, of course. It is also "possible" that by 2014 either or both the plaintiffs will no longer be alive, or may at that time fall within one of the "exempt" categories. Such "vagaries" of life are always present, in almost every case that involves a pre-enforcement challenge. *If the defendants' position were correct, then courts would essentially never be able to engage in pre-enforcement review* . . . . [T]he individual plaintiffs need not show that their anticipated injury is absolutely certain to occur despite the "vagaries" of life; they need merely establish "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement."

Florida, 2010 U.S. Dist. LEXIS 111775, at **64-66 (citations omitted; emphasis added).

The fact that the Individual Mandate does not become effective until 2014 does not defeat Sissel's standing based on future injury. In *Vill. of Bensenville v. FAA*, 376 F.3d 1114 (D.C. Cir. 2004), the plaintiffs challenged Chicago's airport passenger fee, which would not become effective until thirteen years in the future. The court of appeals held that, despite the significant time gap, there was an "impending threat of injury" to the plaintiffs that was "sufficiently real to constitute injury-in-fact and afford constitutional standing," because the decision to impose the fee was "final and, absent action by [the court], come 2017 Chicago will begin collecting [it]." *Id.* at 1119 (citations and quotation marks omitted). Similarly, the Individual Mandate is the law of the land, and it inevitably will be enforced through serious financial penalties beginning in 2014. As Supreme Court precedent makes clear, Sissel "does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough" to establish standing. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *see also Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (A threatened injury that is "certainly impending" constitutes "injury in fact.").

The Government's counter-factual speculation about what the future might hold for Sissel does not undermine his standing. *See, e.g.*, *Va. v. Amer. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (affirming the propriety of "pre-enforcement" challenges and holding that plaintiffs had

standing because they "alleged an actual and well-founded fear that the law [would] be enforced against them"); *Liberty University*, 2010 U.S. Dist. LEXIS 125922 , at **19-21 (holding that, speculation about changing circumstances notwithstanding, "Plaintiffs' allegations, which I take as true, show that they have good reason to believe they will [be subject to the mandate]"). As the D.C. Circuit Court of Appeals noted in *Teva Pharm. USA Inc. v. Sebelius*, 595 F.3d 1303, 1309 (D.C. Cir. 2010), the government "could in principle change its position," but that "seems extraordinarily unlikely," and such "theoretical possibilit[ies]" do not "preclude pre-enforcement review" by courts.[1]

The authorities cited by the Government to challenge Sissel's imminent-injury standing provide no support: In *Tenn. Gas Pipeline Co. v. Fed. Energy Regulatory Comm'n*, 736 F.2d 747 (D.C. Cir. 1984), the plaintiff challenged a new rule adopted by the Federal Energy Regulatory Commission (FERC) for interpreting the statute governing gas-transmission permits (the Natural Gas Act). Even though the Natural Gas Act indisputably applied to the plaintiff, whether and how FERC would apply the specific rule at issue remained highly speculative. *Id.* at 750. The court of appeals held that the challenge was unripe, because FERC's "bare interpretative statement on the meaning of a statutory text," which the agency only "infrequently" applied, imposed no concrete hardship on the plaintiff. *Id.* at 748, 750-51. In stark contrast, in this case, the Government will certainly and predictably apply a clear statutory obligation—the Individual Mandate—on all nonexempt individuals, like Sissel. Unlike the *Tennessee Gas* plaintiff, Sissel's injury is concrete,

[1] Of course, the solution to the Government's concerns about future changing circumstances is obvious. In the very unlikely event that this case were mooted by Sissel's becoming exempt from or compliant with the Individual Mandate, his counsel would be required to inform the Court of that fact. District of Columbia Rules of Professional Conduct, Rule 3.3; *see also* Fed. R. Civ. Proc. 11 (sanctions for unsupported allegations). But the allegations in Sissel's complaint, which must be accepted as true, sufficiently establish an imminent injury that confers standing on him.

because he inevitably faces the "hard choice between compliance certain to be disadvantageous [purchase of undesired and unneeded health insurance] and a high probability of strong sanctions [a financial penalty]." *Id.* at 751.

In *Baldwin v. Sebelius*, No. 10CV1033DMS, 2010 U.S. Dist. LEXIS 89192 (S.D. Cal. Aug. 27, 2010), the court dismissed a challenge to the Individual Mandate for lack of standing. But in that case, the plaintiffs (an employer and an individual) failed "to allege [in their complaint] any particularized injury stemming from the Act." *Id.* at **8-9. In stark contrast to Sissel, the individual plaintiff in *Baldwin* even failed to state whether he was insured, and whether and why he would be subject to the Individual Mandate or its penalty. *Id.* at **9-10. Based on the complaint's utter lack of facts alleging injury, the court unsurprisingly concluded that the plaintiffs lacked standing. *Id.* at *10.

In *Gulf Restoration Network, Inc. v. Nat'l Marine Fisheries Serv.*, No. 09-1883-09-1884, 2010 U.S. Dist. LEXIS 81897, at **22-24 (D.D.C. Aug. 12, 2010), plaintiff environmentalists challenged a federally approved "Fishery Management Plan" for permitting commercial aquaculture facilities. The plaintiffs alleged harm to their personal and business interest in a healthy ecosystem, along with their ability to travel into those areas of the ocean where acquaculture facilities might be built. The court held that they lacked standing, because their harm was vague, generalized, and conjectural, and lacked a causal connection to the Plan—which neither regulated them nor required building of the offending facilities. *Id.* **20-24. Unlike the plaintiffs in that case, Sissel alleges a future injury that is concrete and particularized—facts that the Government does not dispute in its motion. The injury is imminent, because the mandate inevitably will become effective in 2014. And the injury is causally connected to the mandate, because the mandate requires the purchase and maintenance of health insurance, or the payment of a penalty. Sissel's injury is also reasonably

certain to occur, because unless some unforseen superseding cause occurs, he will be subject to the requirement or the penalty. "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 143.

In sum, Sissel suffers both an actual injury—the forced reordering of his personal affairs in preparation for having to satisfy the Individual Mandate—and an imminent injury—the obligation beginning in 2014 to buy health insurance or pay a penalty. This Court should join the several other courts that, in similar circumstances, upheld their plaintiffs' standing to challenge the mandate. The Government's motion to dismiss on grounds of standing should be rejected.

B. Sissel's Claim Is Ripe

The doctrines of standing and ripeness "often overlap significantly." *Pub. Serv. Elec. & Gas Co. v. Fed. Energy Regulatory Comm'n*, 485 F.3d 1164, 1168 (2007). "Ripeness is peculiarly a question of timing. Its basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 580 (1985) (citations omitted). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998). Ripeness turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).

As discussed above with respect to standing, a pre-enforcement action sometimes involves a challenge to a statute that has yet to become effective. Such an action is nevertheless ripe "[w]here the inevitability of the operation of [the] statute against [plaintiff] is patent"; "it is irrelevant . . . that

there will be a time delay before the disputed provisions will come into effect." *Blanchette v. Conn. Gen. Ins. Corp.*, 419 U.S. 102, 143 (1974). In *Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 33 (D.D.C. 2008), *aff'd* 582 F.3d 1 (D.C. Cir. 2009), this Court found a trade association's challenge to a lobbying law yet to come into effect "justiciable," because the association was "regulated by the [law] and will be subject to [its] requirements." *Id.* at 49 n.8. "When the question at issue is well-defined, and when withholding judicial consideration would cause undeniable harm, as here, ripeness concerns pose no obstacle to pre-enforcement review." *Teva Pharm.*, 595 F.3d at 1311.

Sissel's challenge to the Individual Mandate is ripe. First, it is fit for review. Although the Individual Mandate currently is not in effect, it will inevitably go into effect in 2014. The facts alleged in Sissel's complaint establish that the Individual Mandate applies to him, and that he will be subject to its financial obligations. There are no factual developments that could possibly arise between now and 2014 that would help this Court's resolution of how the Individual Mandate applies and whether it is constitutional.

Second, withholding review of this case until 2014 would impose a hardship on Sissel. The Individual Mandate already has forced Sissel to divert his resources away from career and education so that he can save for the imminent purchase of health insurance or payment of the penalty. The injury is only exacerbated the longer a decision on the Individual Mandate's constitutionality goes unresolved. The mandate creates "a direct and immediate dilemma, forcing [Sissel] to choose between extensively organizing [his] financial affairs before the [Individual Mandate] goes into effect, or risking heavy civil penalties." *Liberty University*, 2010 U.S. Dist. LEXIS 125922, at **28-29. Finally, "the public interest would be well served by a prompt resolution of the constitutionality of [the Individual Mandate]." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 582

(1985); *see also Florida*, 2010 U.S. Dist. LEXIS 11175, at *75 (finding similar challenge ripe for the same reasons).

The Government claims that "no injury could occur before 2014, and [Sissel] has not shown that one will occur even then." Mot. at 14. Not so. The facts in the Complaint demonstrate that he is suffering *both* an actual injury from having to alter his personal and financial affairs *and* an imminent injury from having to make outlays to comply with the Individual Mandate. The Government simply ignores the facts of the Complaint, which must be accepted as true.

Next, the Government claims that "any injury to [Sissel] here is far from 'inevitable.'" Mot. at 14. Again, the Government is mistaken. Sissel has an injury that is *more* than inevitable—it has already occurred, and will continue to occur, so long as he needs to make provisions to satisfy the Individual Mandate. With respect to his imminent injury, the Individual Mandate inevitably will operate against him. He is a nonexempt individual who does not want to purchase health insurance (or have to pay a penalty). Moreover, Sissel has been without a need or desire for health insurance for three years, has achieved financial stability, and has maintained good health; there simply is no reason to assume—as the Government does—that an unforeseen intervening event suddenly will render him exempt or compliant with the Individual Mandate before 2014.

C. The Tax Anti-Injunction Act Does Not Deprive This Court of Jurisdiction

The Government asserts that this Court lacks jurisdiction under the Tax Anti-Injunction Act (TAIA), 26 U.S.C. § 7421(a), which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." Mot. at 14-15. The Government claims that, regardless of its official label, the financial penalty for noncompliance with the Individual Mandate is assessed and collected in the same manner as other Internal Revenue Code penalties—*i.e.*, as "taxes." *Id.* at 15. Moreover, it argues, applying the TAIA to the federal

penalty furthers the TAIA's purpose of allowing the Government to collect assessments expeditiously without judicial interference. *Id.* The Government's argument lacks merit.

The TAIA does not apply here for the simple reason that Sissel's challenge has nothing to do with restraining the assessment or collection of any tax. The financial penalty that applies to nonexempt individuals who fail to buy government-mandated health insurance is not a tax. Congress designed and intended the penalty to force individuals to engage in commerce—*i.e.*, to purchase health insurance—and to punish those who fail to comply. The penalty was not designed or intended to raise revenue. As several courts recently have held, and as explained in detail below, the TAIA is not a bar to jurisdiction in cases challenging the Individual Mandate and its punitive penalty. *Liberty University*, 2010 U.S. Dist. LEXIS 125922 at **29-38; *U.S. Citizens Ass'n v. Sebelius*, 2010 U.S. Dist. LEXIS 123481 at **13-14; *Florida*, 2010 U.S. Dist. LEXIS 111775 at **14-56; *Thomas More*, 2010 U.S. Dist. LEXIS 107416 at **14-17; *Commonwealth of Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 603-05 (E.D. Va. 2010).

1. The Penalty Is Not Designed As a Tax

The TAIA, which protects "the [g]overnment's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference," *Bob Jones University v. Simon*, 416 U.S. 725, 736-37 (1974), applies only to "truly revenue-raising tax statutes." *Id.* at 743. A "tax" is "a pecuniary burden laid upon individuals or property for the purpose of supporting the Government." *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996). By contrast, a "penalty" is primarily designed to punish or regulate behavior. *Rodgers v. United States*, 138 F.2d 992, 995 (6th Cir. 1943). As the Supreme Court observed, "[w]hereas [penalties] are readily characterized as sanctions, taxes are typically different because they are usually motivated by revenue-raising, rather than punitive, purposes." *Dep't of*

Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 779-80 (1994); *see also United States v. La Franca*, 282 U.S. 568, 572 (1931) (A tax "is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act."). There is no authority—and the Government provides none—for the proposition that the TAIA applies to penalties or to anything other than true taxes.

The penalty imposed for noncompliance with the Individual Mandate is not a tax, because it is not designed to raise revenue to support the government. Indeed, the Act "does not mention any revenue-generating purpose that is to be served by the Individual Mandate penalty, even though such a purpose is required." *Fla.*, 2010 U.S. Dist. LEXIS 111775 at *36 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995)). Moreover, the Act lists seventeen "revenue offset provisions," and includes a section called "provisions relating to revenue," both of which mention other provisions in the Act that *are* characterized as taxes. *Id.* at *38; *see* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, §§ 9001-9017, 10901-10909. Yet the penalty is not listed among these revenue-raising provisions. Thus, the Act itself does not represent the penalty as a tax.

Instead, the penalty is designed only to coerce purchase and maintenance of federally approved health insurance, and punish nonexempt individuals who fail to do so. According to Congress, the unmistakable purpose of the penalty is to add "millions of new consumers to the health insurance market," deter people from "forego[ing] health insurance coverage and attempt[ing] to self-insure," and prevent them from "wait[ing] to purchase health insurance until they need[] care." Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, §§ 1501(a)(2), 10106(a). Congress chose to achieve those ends by requiring all non-exempt individuals to buy health insurance on pain of monetary penalty. If the mandate to buy health

insurance works as intended, the government will collect no revenue whatsoever, because no one will be penalized for failing to buy health insurance. For these reasons, the minimum essential coverage penalty is not a tax subject to the TAIA.

2. Congress Never Intended the Penalty To Be Treated As a Tax

Not only is the financial penalty not designed to be a tax, but Congress did not intend to impose a new tax when it created the penalty as punishment for noncompliance with the Individual Mandate. First, Congress did not refer to the penalty as a tax in the version of the Act that President Obama signed into law. Second, Congress used the term "tax" to describe several other provisions of the Act, but chose not to refer to the penalty as a tax. Third, Congress expressly relied on its Commerce Clause power, and not its taxing power, as constitutional authority for the Individual Mandate. And fourth, Congress eliminated traditional tax enforcement methods for failure to pay the penalty. Given Congress's clear intent, the TAIA cannot be used to bar Sissel's suit.

Congress considered several alternative health care bills before finally adopting the Act. As the district court in the *Florida* case observed, the House debated the "America's Affordable Health Choices Act of 2009 " (H.R. 3200), which contained a penalty for individuals who failed to purchase health insurance. *Florida*, 2010 U.S. Dist. LEXIS 111775 at **25-26. This proposed legislation unambiguously referred to the penalty as a "tax on individuals without acceptable health care coverage." *Id.* at *25. The "Affordable Health Care for America Act" superseded H.R. 3200, and was passed by the House on November 7, 2009. *Id.* at *26. Like the bill it replaced, H.R. 3962 also repeatedly referred to the penalty as a tax. *Id.* Likewise, the Senate debated the "America's Healthy Future Act," which included an "excise tax on individuals without essential health benefits coverage." *Id.* at **26-27.

But the Act that Congress ultimately passed does not identify the financial penalty for failure to maintain health insurance as a tax; the Act specifically refers to the penalty as just that—a penalty. *See, e.g.*, 26 U.S.C. § 5000A(b)(1) ("[T]here is hereby imposed on the taxpayer a penalty . . . ."); 26 U.S.C. § 5000A(c)(1) ("The amount of the penalty imposed by this section on any taxpayer . . . shall be . . . ."); 26 U.S.C. § 5000A(g)(1) ("The penalty provided by this section shall be paid upon notice and demand by the Secretary . . . ."). Congress's decision rejecting the use of the term "tax" and adopting the term "penalty" is an important signal that Congress did not intend for the penalty to be treated as a tax in the final legislation. *Florida*, 716 F. Supp. 2d at 1134 ("Congress did not call it a tax, despite knowing how to do so."); s*ee also INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."); *Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

That the penalty is not to be treated as a tax is bolstered by the fact that the Act imposes various other taxes that are expressly identified as such. *See, e.g.*, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, § 9001 (excise tax on high cost employer-sponsored health coverage), § 9015 (additional hospital insurance tax on high-income taxpayers), § 9017 (excise tax on elective cosmetic medical procedures), § 10907 (excise tax on indoor tanning services). Obviously, Congress knew how to create a tax under the Act when it wanted to, but it chose not do so with respect to the financial penalty. "It is well settled that '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate

inclusion or exclusion.'" *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (quoting *Russello*, 464 U.S. at 23). "By deliberately changing the characterization of the exaction from a 'tax' to a 'penalty,' but at the same time including many other 'taxes' in the Act, it is manifestly clear that Congress intended it to be a penalty and not a tax." *Florida*, 2010 U.S. Dist. LEXIS 111775, at *31.

Moreover, Congress consciously avoided citation to its taxing authority as its alleged source of authority for the Individual Mandate and penalty. Instead, Congress relied exclusively on the Commerce Clause for its alleged authority. *Id.* at *33 ("Congress did not state in the Act that it was exercising its taxing authority to impose the individual mandate and penalty; instead, it relied exclusively on its power under the Commerce Clause."). The Act contains a number of findings purporting to show that the Individual Mandate regulates commercial activity. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, §§ 1501(a), 10106(a). These findings all relate to Congress's Commerce Clause authority, not its taxing power.

Furthermore, the penalty is also not enforced like a traditional tax. The Act expressly states that an individual who fails to timely pay the penalty shall not be subject to criminal prosecution or penalties. 26 U.S.C. § 5000A(g)(2)(A). And the Act prohibits the Secretary from placing a lien or levy on any property of an individual for failing to pay the penalty. 26 U.S.C. § 5000A(g)(2)(B). "These exemptions from normal tax attributes—coupled with Congress's failure to identify its taxing authority—belie the claim that, simply because it is mentioned in the Internal Revenue Code, the penalty must be a tax." *Florida*, 2010 U.S. Dist. LEXIS 111775, at *35.

Finally, the Government cites *Barr v. United States*, 736 F.2d 1134 (7th Cir. 1984), for the proposition that, because the financial penalty is assessed and collected like other IRS penalties, TAIA must apply. In *Barr*, the IRS imposed a penalty, authorized under the Internal Revenue Code, against a taxpayer who had failed to pay taxes after filing a false withholding statement. The

Internal Revenue Code specifically classifies such a penalty as a "tax." Accordingly, the Seventh Circuit Court of Appeals unremarkably held that the TAIA barred the taxpayer's suit to restrain collection of the penalty.

Here, by contrast, neither the Act nor the Internal Revenue Code designates the penalty for noncompliance with the Individual Mandate as a "tax" *for any purpose*, let alone for purposes of TAIA. "It would be inappropriate to give tax treatment under the Anti-Injunction Act to a civil penalty that, by its own terms, is not a tax; is not to be enforced as a tax; and does not bear any meaningful relationship to the revenue-generating purpose of the tax code." *Florida*, 2010 U.S. Dist. LEXIS 111775, at *49. Congress cannot insulate such a penalty by merely codifying it within the Internal Revenue Code, only to claim that the TAIA deprives courts of jurisdiction to consider a legal challenge against the penalty. *See* 26 U.S.C. § 7806(b) ("No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title."). Treating the penalty in this case as a tax for TAIA purposes would license Congress to shield any penalty contained in any federal statute from pre-enforcement review, by simply placing it in the Internal Revenue Code. The Individual Mandate purports to be a regulation of interstate commerce, and the penalty to be an enforcement mechanism, not a tax. The Tax Anti-Injunction Act therefore does not bar this Court's jurisdiction.

II

SISSEL STATES A CLAIM UPON WHICH RELIEF MAY BE GRANTED

A. The Commerce Clause Does Not Authorize the Individual Mandate

1. The Commerce Clause Power Is Limited and Does Not Authorize Congress's Unprecedented Attempt To Regulate Inactivity

The Act identifies Congress's Commerce Clause power as the source of its authority for enacting the Individual Mandate. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, §§ 1501(a), 10106(a). The Commerce Clause allows Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." While this power may be broad, it has "outer limits." *United States v. Morrison*, 529 U.S. 598, 608 (2000). The Constitution created a federal government of limited, enumerated powers, and the Commerce Clause must not be interpreted so broadly as to "convert congressional authority . . . to a general police power of the sort retained by the States." *United States v. Lopez*, 514 U.S. 549, 552, 567 (1995). Moreover, congressional findings, no matter how extensive, cannot enlarge Congress's Commerce Clause power. *Morrison*, 529 U.S. at 614.

Courts have defined three categories of interstate commerce that Congress may regulate: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "activities that substantially affect interstate commerce." *Id.* at 609 (internal citations and quotation marks omitted). The Individual Mandate implicates, if anything, only the third category. Contrary to the Government's motion, Sissel's complaint states a viable claim that the Individual Mandate finds no authority in the Commerce Clause or any of the precedents interpreting it.

In every case testing the constitutionality of a federal law under the Commerce Clause, the law at issue has regulated some activity—*i.e.*, some action, transaction, or deed affirmatively and voluntarily undertaken by the regulated party. In *Gonzales v. Raich*, 545 U.S. 1, 19 (2005), the Supreme Court upheld a federal statute regulating an ***activity***—a Californian's production of marijuana for home consumption—because it had a substantial effect on the national supply and demand for marijuana. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Supreme Court upheld federal labor legislation because it regulated the ***activity*** of hiring and maintaining a workforce. Even in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), which the Supreme Court has described as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, 514 U.S. at 560, the regulation at issue involved economic ***activity***, and not inactivity. In these cases, the regulated plaintiffs placed themselves voluntarily within the stream of commerce.

In contrast to these and other federal statutes challenged under the Commerce Clause, the Individual Mandate purports to compel unwilling individuals to perform involuntary acts and, as a result, submit to Commerce Clause regulation. The mandate regulates ***inactivity*** by forcing nonexempt individuals who do not need or want health insurance to nevertheless purchase that service from a private vendor. Unlike the *Raich*, *NLRB*, and *Wickard* statutes, "the individual mandate applies across the board"; "[p]eople have no choice and there is no way to avoid it." *Florida*, 2010 U.S. Dist. LEXIS 111775, at *117. There simply are no precedents that authorize Congress to compel participation in economic activity under the Commerce Clause. *Id.* at *114. Even the nonpartisan Congressional Research Service[2] reported to the Congress that "it is unclear

[2] The Congressional Research Service works exclusively for the United States Congress, providing policy and legal analysis to committees and Members of both the House and Senate, regardless of (continued...)

whether the [Commerce Clause] would provide a solid constitutional foundation for legislation containing a requirement to have health insurance." Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, July 24, 2009, at 3.

Where the Constitution *does* allow Congress power to compel behavior, it does not employ the word "regulate," but other words. For example, in *The Selective Draft Law Cases*, 245 U.S. 366, 377 (1918), the Supreme Court found that Congress may draft persons into the military against their will under the power to "raise" armies conferred in Article I, section 8, clause 12 of the Constitution. But Congress is not given power to "raise" or "cause" commerce—only to "regulate" commerce in which individuals first much choose to engage. If, on the other hand, the Commerce Clause were intended to allow the federal government plenary power to legislate about any activity that has some ultimate effect on interstate commerce, large portions of the Constitution would be rendered surplusage. As Justice Thomas observed in *Lopez*, the Constitution gives Congress powers to lay and collect taxes, establish a post office, and do other things that have some effect on interstate commerce. But these provisions, along with the rest of Article I, section 8, "would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct." *Lopez*, 514 U.S. at 589 (Thomas, J., concurring.). While this is not the time for their adjudication on the merits, these arguments are clearly non-frivolous, and do satisfy Rule 12(b)(6) by stating a plausible legal theory that could entitle Sissel to relief.

Courts considering constitutional challenges to the Individual Mandate are split. Two courts—in Virginia and Michigan—have granted motions to dismiss on the ground that the plaintiffs

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[2](...continued)
party affiliation.

failed to state a viable claim that the mandate is unconstitutional under the Commerce Clause. *Liberty University*, 2010 U.S. Dist. LEXIS 125922, at *53; *Thomas More*, 2010 U.S. Dist. LEXIS 107416, at **17-29. But *three* other courts—in Virginia, Ohio, and Florida—have denied similar motions to dismiss, holding that the Individual Mandate was unprecedented and raised serious constitutional questions. *Commonwealth of Va.*, 702 F. Supp. 2d at 612; *United States Citizen's Ass'n*, 2010 U.S. Dist. LEXIS 123481, at **15-16; *Florida*, 2010 U.S. Dist. LEXIS 111775, at *118. The Virginia court went further on December 13, when it granted summary judgment for the plaintiffs and became the first court to strike down the Individual Mandate as beyond the scope of the Commerce Clause. *Commonwealth of Va. ex rel. Cuccinelli*, No. 3:10CV-188-HEH, 2010 U.S. Dist. LEXIS 130814, at *39 (E.D. Va. Dec. 13, 2010).

The Individual Mandate represents an unprecedented exercise of congressional power, and presents a novel issue for judicial review. In light of this, the relatively undemanding standard of review for Rule 12(b)(6) motions, and the majority view thus far of the courts who have ruled on the same issue, the Court should find that Sissel pleads a viable claim for violation of the Commerce Clause.

2. The Government Fails To Show That Sissel Pleads an Implausible Claim Against the Individual Mandate

The Government bears a heavy burden in showing that Sissel's case should be dismissed for failure to state a claim under Rule 12(b)(6)—a burden it has not met. The Government begins with a lengthy exposition on Congress's "broad" Commerce Clause authority. Mot. at 17-19. As examples, the Government points to *Raich* and *Wickard*—which involved the regulation of affimative and self-directed *activity*—as proof that Congress can impose obligations "even on individuals who claim[] not to participate in interstate commerce." *Id.* at 19. *Sissel* does not dispute that the Commerce Clause power may be broad. Nor does it dispute that Congress may impose

obligations even on individuals (like the *Raich* and *Wickard* plaintiffs) who mistakenly claim they do not participate in some way in interstate commerce. But commercial participation entails *activity*, which is precisely what the laws upheld in *Raich* and *Wickard* targeted. The Government's defense of broad congressional authority under the Commerce Clause simply ignores the essential limitation on that authority that is the subject of this suit: Congress cannot regulate inactivity. *Morrison*, 529 U.S. at 608 (The Commerce Clause power is limited.).

Next, the Government asserts that the Act and its Individual Mandate are just another example of the Congress's historical regulation of "the interstate health insurance market." Mot. at 20-21. The Government presents the Individual Mandate as a small piece of Congress's "comprehensive reform" efforts—a law that it claims regulates "[economic] decisions about how to pay for services in the health care market." *Id.* at 21. The history of, and public policy reasons for, Congress's increasing interference in the health care market have no bearing whatsoever on whether the Individual Mandate is within its Commerce Clause power. Ironically, all of the Government's cited examples of health insurance regulations, including examples taken from the Act itself, dictate how health insurance is to be "provided," "sold," or "cover[ed]"—that is, the regulations all target voluntary, commercial *activities*. The choice *not to purchase* a product or service like health insurance—while a "decision"—nevertheless is, by definition, *inaction* with respect to the market for that product or service. It is only the external manifestation of such internal decision-making—that is, some concrete action, activity, or deed—that the Congress has, in certain circumstances, been permitted to regulate. *Commonwealth of Va.*, 2010 U.S. Dist. LEXIS 130814, at *39 ("[A]n individual's personal decision to purchase—or decline to purchase—health insurance from a private provider is beyond the historical reach of the Commerce Clause . . . ."); *see also Raich*, 545 U.S. at 19 (upholding regulation, not of a decision to pursue marijuana production, but

of its actual production); *Wickard*, 317 U.S. at 125 (upholding regulation, not of a decision to pursue wheat farming, but of its actual production).

The Government also attempts an end-run around the Commerce Clause with an appeal to the Necessary and Proper Clause, claiming that the Individual Mandate is "essential" to the success of Congress's health insurance reforms. Mot. at 22-25. The Necessary and Proper Clause gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [including the Commerce Clause power]." U.S. Const., art. I, § 8, cl. 18. It is not an independent source of congressional authority, and it cannot be used as a vehicle to enforce an otherwise unconstitutional exercise of Commerce Clause power. *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (the question is whether "the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power"). Rather, the Necessary and Proper Clause "may only be constitutionally deployed when tethered to a lawful exercise of an enumerated power." *Commonwealth of Va.*, 2010 U.S. District LEXIS 130814, at **39-40 (rejecting the Government's argument that the Individual Mandate finds support in the Necessary and Proper Clause). "If the mere fact that an individual lacks health insurance does not constitute the type of activity subject to regulation under the Commerce Clause, then logically an attempt to enforce such provision under the Necessary and Proper Clause is equally offensive to the Constitution." *Commonwealth of Virginia*, 702 F. Supp. 2d at 611.

Finally, the Government argues that the Individual Mandate regulates individuals' "decisions" about how and when to pay for health care, and that those decisions in the aggregate have substantial effects on interstate commerce. Mot. at 24-29. It insists that Americans *must* be forced to buy health insurance in order to (1) maximize the insurance risk pool and thereby control

insurance rates, and (2) avoid the allegedly crippling costs to the taxpayer, the insured, hospitals, and private insurers of having to subsidize the uninsureds' health care bills. *Id.*

First, as discussed earlier, there is no Supreme Court or Court of Appeals precedent that comes close to authorizing congressional power under the Commerce Clause over mere "decisions." And with good reason: If Congress could regulate decisions that in the aggregate affected interstate commerce, then Congress could regulate *anything—i.e.*, "the same reasoning [used to justify the Individual Mandate] could apply to transportation, housing, or nutritional decisions." *Commonwealth of Virginia*, 2010 U.S. Dist. LEXIS 130814, at *38. To advance or remedy a problem pertaining to interstate commerce, Congress could mandate that walkers and bikers purchase cars, that renters purchase houses, or that vegetarians purchase and consume meat. Of course, the Commerce Clause power "is subject to outer limits," *Morrison*, 529 U.S. at 608, and cannot logically reach mere "decisions" without becoming a boundless source of power for Congress.

Second, the Individual Mandate's alleged benefits cannot cure its constitutional deficiencies. As the Supreme Court recently noted, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010). Because it lies beyond congressional authority, the Individual Mandate must fall.

B. The General Welfare Clause Does Not Immunize the Individual Mandate

The Government argues that the Individual Mandate is constitutional under Congress's "Power To lay and collect Taxes . . . and provide for the . . . general Welfare." U.S. Const. art. I, § 8, cl. 1. In support of its argument, the Government contends that the penalty paid by nonexempt individuals who fail to buy and maintain health insurance actually is a "tax" presumably used for

the general welfare. The Government's characterization of the Individual Mandate is wrong, and the General Welfare Clause provides no support.

The Government repeats the same error as in its argument that the TAIA jurisdictionally precludes Sissel's suit. A careful review of the history and text of the Act demonstrates conclusively that Congress neither designed nor intended for the Individual Mandate penalty to be a tax. Instead, the penalty is a punitive measure whose primary purpose is to compel nonexempt individuals to buy health insurance. *United States v. La Franca*, 282 U.S. at 572 (the terms "tax" and "penalty" are *not* interchangeable"). As the Supreme Court in *La Franca* aptly observed, "[if] an exaction [is] clearly a penalty, it cannot be converted into a tax by the simple expedient of calling it such." *Id.*

The most recent Virginia court decision rejects the Government's identical defense under the General Welfare Clause in a challenge to the Individual Mandate. It explains:

> Although purportedly grounded in the General Welfare Clause, the notion that the generation of revenue was a significant legislative objective is a transparent afterthought. The legislative purpose underlying this provision was purely regulation of what Congress misperceived to be economic activity. The only revenue generated under the Provision is incidental to a citizen's failure to obey the law by requiring the minimum level of insurance coverage. The resulting revenue is extraneous to any tax need.

Commonwealth of Va., 2010 U.S. Dist. LEXIS 130814, at *51 (internal citation and quotation marks omitted).

Congress cannot use taxation as a tool for regulating matters that lie beyond the scope of Congress's regulatory authority. In the *Child Labor Tax Case*, 259 U.S. 20, 34-35 (1922), the IRS assessed Drexel Furniture over $6,000 in penalties because Drexel had employed an underage boy in its factory, in violation of the Federal Child Labor Tax Law. *Id.* Drexel argued that the fine was not a tax, but an unconstitutional federal regulation of child labor, a matter which fell exclusively within state jurisdiction. *Id.* at 36. The Court agreed. Though styled as a tax on profits, the Court

found that the penalty constituted a backdoor regulation of child labor, an activity then considered beyond Congress's regulatory authority. *Id.* at 37-38. Congress had overstepped its enumerated powers by cloaking an unconstitutional penalty in the trappings of taxation.

The Court adopted similar reasoning in *United States v. Constantine*, 296 U.S. 287, 294 (1935), invalidating a post-Prohibition federal law that imposed a "special excise tax" on liquor dealers operating in violation of state laws prohibiting liquor sales. *Id.* at 288-90. The federal government defended the law as a tax, but the Court determined that it was clearly intended to penalize activity outside the scope of Congress's authority. *Id.* at 295-96. The so-called tax penalized the commission of a state crime—the sale of alcohol—over which the federal government had no jurisdiction. *Id.* at 294. Since the law served a penal purpose and punished activity that Congress had no constitutional basis to proscribe, the Court held that the law exceeded Congress's enumerated powers and intruded on state jurisdiction "under the guise of a taxing act." *Id.* at 296.

In this case, the Government's argument fails because the Act imposes the Individual Mandate and penalty for the purpose of regulating in an area that falls outside the ambit of Congress's enumerated powers. Congress lacks Commerce Clause authority to compel Americans to purchase health insurance. If the enumeration of powers in Article I, section 8 means anything, it is that Congress cannot accomplish the same unconstitutional end by renaming the Individual Mandate's penalty a "tax." Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, N.Y.U.J.L. & Liberty, Forthcoming, Georgetown Public Research Paper No. 10-58) ("[If this] theory is accepted, Congress would be able to penalize

or mandate any activity by anyone in the country, provided it limited the sanction to a fine enforced by the Internal Revenue Service.").[3]

CONCLUSION

For the foregoing reasons, the Government's motion to dismiss should be denied.

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Respectfully submitted,

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[3] This source is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680392 (last visited Dec. 15, 2010).

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2010, I electronically filed the foregoing PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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